United States Department of State

Washington, D.C. 20520

January 19, 2013

MEMORANDUM OF THE LEGAL ADVISER REGARDING UNITED STATES IMPLEMENTATION OF THE HAGUE CONVENTION ON CHOICE OF COURTS AGREEMENTS (COCA)

On January 19, 2009, Legal Adviser John Bellinger signed the Hague Convention on Choice of Courts Agreement (COCA) (Attachment 1) on behalf of the United States. In the last four years, the U.S. Department of State's Office of the Legal Adviser (particularly the Office of Private International Law (L/PIL)) has expended great effort seeking to identify a mechanism for implementing this Convention (at such time as the United States becomes a party to it) in a way that would accommodate the interests of all concerned participants at both the federal and state levels. Our goal has been to develop an agreed-upon package of legislation that would implement the Convention effectively in the United States. During that time, two principal options have emerged for COCA implementation:

I. The "Cooperative Federalism" Approach:

Over the past four years, the Legal Adviser and other representatives of the Office of the Legal Adviser have participated in numerous meetings and have engaged in extended discussions among concerned stakeholders regarding an implementation scheme for the Convention. At those meetings, many participants have expressed strongly held and divergent views on issues relating to domestic implementation of the COCA, including with regard to the scope of federal court jurisdiction and the law applicable in federal court. The compromise proposal set forth in our April 16, 2012, State Department White Paper (Attachment 2) was intended to bridge the differences among the many views expressed. We continue to believe that the White Paper's approach represents a principled position and the one most likely to attract broad support from different stakeholders. The Department of Justice has advised that the White Paper approach would raise no constitutional concerns were it adopted as the method of COCA implementation.

The State Department's White Paper proposal presents a compromise with regard to a bundle of issues. It strikes what we believe is a fair balance between federal and state interests, taking into account all of the relevant circumstances. The White Paper is premised on a cooperative federalism approach involving parallel federal and state

legislation, with states having the ability to elect to opt out of the federal statute and instead be governed by state law, applicable in state court, based on the uniform act developed by the Uniform Law Commission (ULC). It makes no change in existing rules regarding federal diversity jurisdiction or removal to federal court. It gives states autonomy in determining the length of the relevant statute of limitations and it allows states to elect whether to accept "no-connection" cases that involve no contacts with the forum. Nor does our proposed approach impair the authority of the states to establish common law jurisprudence with respect to substantive law relating to contracts or the recognition and enforcement of judgments. Whether or not a court is applying the federal implementing law or a state's enactment of the uniform act, it is understood that certain principles of state law that are not addressed in the Convention will apply.

The White Paper approach was supported, as a necessary compromise, by the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, and the prevailing majority of polled members of the Section of International Law of the American Bar Association. The Committee on Federal-State Jurisdiction of the Judicial Conference of the United States did not take a position on the White Paper proposals. The Maritime Law Association objected to the proposals, stating that it believes that cooperative federalism is an inappropriate method for implementation of a convention. The Uniform Law Commission and the Conference of Chief Justices indicated that they cannot support the White Paper approach as a workable compromise, specifically because of the provision on applicable law in federal court. In the attached correspondence with ULC President Michael Houghton (Attachment 3), I explained why the State Department believes the White Paper approach is fair and workable, should all stakeholders endorse it. A key factor underlies the White Paper proposals: under cooperative federalism, by design the federal and state implementing statutes are to be substantively the same – in fact, identical insofar as possible – and, in the event of any substantive discrepancy, the federal statute will preempt.

On July 18, 2012, the Uniform Law Commission formally approved the Uniform Choice of Court Agreements Convention Implementation Act (Uniform Act) (Attachment 4). We had advised the ULC that, in light of the unresolved issues regarding implementation of the Convention, the State Department was not in a position to endorse that action. We have further cautioned the ULC that, because the draft federal legislation is still evolving – and would likely undergo further change if and when it is taken up by Congress – if states proceed with enactment of the Uniform Act in its current form, there is a serious risk that non-conforming federal and state texts could impair the effective implementation of the Convention. The Uniform Act and the federal legislation that was drafted to accompany it (Attachment 5) are quite detailed and largely replicate all of the operational provisions in the Convention.

II. The "Federal Arbitration Act" Approach:

With the continuing impasse over the acceptability of the White Paper proposals, progress on a cooperative federalism approach remains stalled. Those who objected to the White Paper compromise have not come forward with an alternative proposal, based on cooperative federalism, that would attract broader support from key stakeholders. Accordingly, I thought it necessary and important to present an alternative proposal before the end of my tenure as Legal Adviser.

At a public meeting on January 4, 2013, held under the auspices of the State Department's Advisory Committee on Private International Law (ACPIL), a different draft vehicle for COCA implementation was discussed. It is a shorter version of a federal statute (Attachment 6), patterned after the gap-filling approach of the legislation (chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208) (Attachment 7) that has proved successful in implementing the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). It does not seek to replicate the operative provisions of the Convention, generally leaving those to be directly enforceable in U.S. courts in self-executing fashion, and it does not contemplate parallel uniform state law.

At that meeting, a representative of the Conference of Chief Justices queried whether the new approach could achieve the necessary level of support from stakeholders. At the same time, the "Federal Arbitration Act" approach was strongly endorsed by representatives of the New York State Bar Association International Section, the New York City Bar Committee on International Commercial Disputes, the Maritime Law Association, and a number of other practitioners and academics in attendance. The ULC said that it cannot support that approach, but offered no alternative to break the impasse surrounding the "cooperative federalism" approach. As of this date, my judgment is that the federal-only approach is the most promising available path that would achieve simplicity, uniformity, and predictability in the implementation of the Convention. **While further vetting and polishing of the proposal is advisable in the next period, I have recommended to my successor as Legal Adviser and the next Secretary of State that, absent new proposals from key stakeholders regarding how the package of issues under the cooperative federalism approach might be restructured to gain wider support, the Department should focus its energies upon the federal-only approach in order to complete this important implementation effort.**

Let me say in closing that achieving U.S. ratification of the COCA is an important experiment in how private law conventions may be implemented in our federal system. We continue to believe that creative solutions are appropriate and necessary in order to bridge the policy differences that exist among key stakeholders. We also believe that either the White Paper approach or a fully vetted version of the Federal Arbitration Act approach would represent a reasonable method of implementation that would allow the United States to meet its international obligations under the Convention at such time as it becomes a party. Because the former approach is currently at an impasse, the latter

approach is currently the most promising way forward. I hope that the extensive groundwork that has been laid during my time as Legal Adviser will make it possible for all stakeholders to arrive at an agreed-upon approach that would allow the United States to proceed to prompt ratification and implementation of this most important convention.

Harold Hongju Koh
Legal Adviser
U.S. Department of State

Attachments:

1 – Convention on Choice of Court Agreements
2 – State Department White Paper, April 16, 2012
3 – Correspondence between the Legal Adviser and Michael Houghton, President of the Uniform Law Commission
4 – Uniform Choice of Court Agreements Convention Implementation Act, adopted July 18, 2012
5 – Draft federal implementing legislation, April 24, 2012
6 – Draft federal implementing legislation, December 11, 2012
7 – Chapter 2 of the Federal Arbitration Act